UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	Case No. 97-0853-CR-Middlebrooks
	)	
v.	)	
	)	
ATLAS IRON PROCESSORS, INC., et al.,	)	Magistrate Judge Robert L. Dubé
	)	(May 7, 1998, Amended Order of Reference)
Defendants.	)	
	)	**UNITED STATES MEMORANDUM**
	)	**REGARDING SUNSHINE'S WAIVER**
	)	**OF ITS SIXTH AMENDMENT**
	)	**RIGHT TO COUNSEL AND**
	)	**A CORPORATION'S**
	)	**LACK OF ENTITLEMENT**
	)	**TO COURT-APPOINTED COUNSEL**

I. INTRODUCTION

At trial on February 5, 1999, the defendants raised the issue of whether Sunshine Metal Processing, Inc. (Sunshine) is on trial in the above-captioned case. After reviewing a transcript of a hearing before Judge Lenore Nesbitt, the Court concluded that Sunshine was arraigned at a hearing in front of Judge Nesbitt. The Court then raised the issue of whether Sunshine should be appointed counsel. The Court raised the issue due to Judge Nesbitt's suggestion that Sunshine might be entitled to court-appointed counsel if the corporation could not afford to represent itself. This memorandum concludes Sunshine has waived its right to be represented at this trial and that as an indigent corporation Sunshine is not entitled to court-appointed representation.

II. FACTS

On February 20, 1998, Judge Nesbitt ordered attorney Mark Nurik to file a motion in the bankruptcy court to seeking clarification as to whether it was in the

best interests of the Sunshine estate to have criminal counsel represent it in the above-captioned case. See Exhibit 1. On April 16, 1998, Sunshine estate Trustee Jams P. Feltman filed an emergency motion to employ Mark Nurik as criminal defense counsel in this case. See Exhibit 2. On April 24, 1998, United States Bankruptcy Judge Robert A. Mark granted the Emergency Motion. See Exhibit 3. Nurik was directed to continue "monitoring the criminal proceedings transferred by the Department of Justice to the Federal District Court, Southern District of Florida." Id. at 3. Nurik continued to monitor the case on behalf of the estate and on November 23, 1998, Nurik filed a Summary of Interim Fee Application with the United States Bankruptcy Court in the Southern District of Florida for the period of April 1, 1998, through June 23, 1998. See Exhibit 4. Included in the itemization of his fees were conferences with both Rick Hamilton and Ben Kuehne, and research into whether the trustee in bankruptcy could enter into a plea on behalf of the corporation. Id.

On July 22, 1988, Frank P. Terzo, the attorney for the Trustee, mailed a letter to Richard T. Hamilton expressing his legal opinion with regard to whether the Trustee could enter a plea agreement on behalf of the estate. See Exhibit 5. Terzo concluded a trustee has no authority to enter a guilty plea on behalf of an estate and cited JNC Companies v. Meehan, 797 P.2d 1, 1-4 (Ariz. 1990), as authority for his opinion. Id. at 1. Later in his letter, Terzo expressed his legal opinion that, because the Department's claim was "subordinate to the claims of other unsecured creditors, the Sunshine estate would have no reason to defend at trial the government's case against Sunshine since such defense through special criminal counsel would not be in the best interests of the estate nor of any benefit to its creditors." Id. at 6. In support of his opinion, Terzo cited In re Duque, 48 B.R. 965 (S.D. Fla. 1984) which he read as holding that "the employment of special criminal counsel to represent a debtor for pre-bankruptcy crimes is generally not in the interests of the estate nor does it benefit its creditors." Id.

On January 25, 1999, the trial in the above-captioned case began and no representative of Sunshine appeared to contest the criminal charges at issue.

III. LAW

A. WAIVER

That a criminal defendant has a right to waive counsel is long-established principle of law. Likewise the requirements for showing waiver are also long established. The rule in this Circuit provides: "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." United States v. Garcia, 517 F.2d 272, 277 (5th Cir. 1975) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)). In this case, upon a review of all the relevant facts and circumstances, there can be no doubt that Sunshine has waived criminal representation in this case. First, the record shows the Sunshine estate, through Mark Nurik, who was specifically directed by the Court to monitor these criminal proceedings, is fully aware of the current trial. Second, the record shows that the Sunshine estate made a conscious, reasoned decision to not defend against the criminal prosecution in this case because such action is not in the best interest of its creditors. Given the background of this case (Sunshine is in bankruptcy and defending the criminal charges will not benefit the creditors), the experience (both Mark Nurik and Frank Terzo are seasoned attorneys in South Florida), and conduct of the accused (Sunshine did not make an appearance at this trial), there can be no doubt that Sunshine has waived its right to counsel in this case.

B. COURT-APPOINTED COUNSEL FOR CORPORATIONS

The law is clear that neither the Constitution not the Criminal Justice Act provide corporations a right of court-appointed counsel. In the leading case on this issue, the Ninth Circuit held,

> The Criminal Justice Act provides for appointment of counsel for an indigent "person," but does not say whether a corporation is a "person" for purposes of appointment of counsel. 18 U.S.C. § 3006A(a). The word "person" in a federal statute includes corporations "unless the context indicates otherwise." 1 U.S.C. § 1. In the statute providing for appointment of counsel, the context does indeed "indicate otherwise." The statutory context includes a list of classes of persons eligible, with catch-all clauses for a financially eligible person who "is entitled to appointment of counsel under the sixth amendment to the constitution"or "faces loss of liberty." 18 U.S.C. § 3006A(a)(1)(H), (I). If the purpose of the statute is to assure that criminal defendants' constitutional right to appointed counsel is protected, then no appointments are needed for corporations. Being incorporeal, corporations cannot be imprisoned, so they have no constitutional right to appointed counsel. See Scott v. Illinois, 440 U.S. 367 (1979). The Sixth Amendment accordingly does not provide for appointment of counsel for corporations without sufficient assets to retain counsel on their own. Although authority is scarce, we conclude from context that the CJA does not so provide either. United States v. Hoskins, 639 F. Supp. 512 (W.D.N.Y. 1986), aff'd without pub'd op., 875 F.2d 308 (2d Cir. 1989). *Thus, corporations have a right to counsel, but no right to appointed counsel, even if they cannot afford to retain their own.*

United States v. Unimex, 991 F.2d 546, 549-50 (11th Cir. 1993) (emphasis added) (some citations omitted). See also United States v. Hartsell, 127 F.3d 343, 350 (4th Cir. 1997) ("We [find] no suggestion anywhere in 18 U.S.C. § 3006A that corporations are entitled to publicly appointed counsel."); United States v. Rivera, 912 F. Supp. 634, 638 (D.P.R. 1996) ("[We] find that neither under Puerto Rico Local Rule 402, the Model Criminal Justice Act Plan for this District, § 3006A, or the Sixth Amendment of the United States Constitution are corporate defendants, even if financially unable, entitled to the appointment of counsel under CJA . . . .").

Because Sunshine's estate has made the reasoned decision to waive counsel on behalf of Sunshine, and because corporations are not entitled to court-appointed counsel, this Court should find that Sunshine is properly a defendant in this trial and, therefore, its name should be submitted to the jury for it to render a verdict on Sunshine's guilt or lack of guilt as will be done with all of the other defendants.

Moreover, in its opening statement, the United States referred to there being two corporate defendants. To alter the number of defendants in midtrial may lead the jury to conclude they were misled by the United States in its opening. Similarly, to ask the jury to decide the fate of only one corporate defendant without explanation would confuse the jury and may adversely affect its deliberative process. Finally, the United States fears its case will be prejudiced if, upon considering the verdict form, the jury concludes the United States has unfairly elected to prosecute only Atlas Iron Processors (and by extension the Giordano family) when Sunshine Metal Processing is equally culpable under the Sherman Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via hand-delivery to the Office of the Clerk of Court on this 8th day of February 1999. In addition, copies of the above-captioned pleadings were served upon the defendants via hand-delivery on this 8th day of February 1999.

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